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Saul Litvinoff

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CONTRACTS IN PARTICULAR

Saul Litvinoff*

SALES—REDHIBITION—DEATH

*Doughty v. General Motors Corp.*¹ raised the question whether the action in redhibition is personal or heritable. Action was brought by heirs of the deceased purchaser of an automobile against the manufacturer of the vehicle following an accident fatal to the purchaser. In the opinion of the majority of the court, there was no privity of contract between plaintiffs and defendants; it followed that plaintiffs had only an action in tort which the court found had prescribed.

It is unquestionable however that an action in redhibition is heritable, as suggested in a concurring opinion in the *Doughty* case.² Indeed, according to Louisiana Civil Code article 1999, every obligation must be regarded as heritable on both sides unless the contrary is either clearly expressed or necessarily implied from the nature of the contract.³ That the rights arising from a valid contract are also vested in the parties' heirs is a principle clearly asserted in Civil Code article 1963(4).⁴

In support of its conclusion, the opinion of the majority invoked *Cartwright v. Chrysler Corp.*⁵ In that case, it is true, the supreme court found lack of privity between the parties,

* Professor of Law, Louisiana State University.

1. 303 So. 2d 202 (La. App. 4th Cir. 1974).

2. *Id.* at 203.

3. Refer to LA. CIV. CODE art. 1997: "An obligation is strictly personal, when none but the obligee can enforce the performance, or when it can be enforced only against the obligor. It is heritable when the heirs and assigns of the one party may enforce the performance against the heirs of the other. It is real when it is attached to immovable property, and passes with it into whatever hands it may come, without making the third possessor personally responsible."

4. In *Ferguson v. Thomas*, 3 Mart. (N.S.) 75 (1824), it was said: "All obligations pass to the heirs, active as well as passive, save those in which the promisor's personal qualities (e.g., those of a painter or physician) were the leading motive of the contract, and the want of which another cannot supply, nor pecuniary damages compensate. In such cases the heirs cannot insist on performing the contract." In the same context, see also Comment, *Heritability of Conventional Obligations*, 31 TUL. L. REV. 324 (1957).

5. 255 La. 598, 232 So. 2d 285 (1970).

but the action brought by plaintiff was not against the manufacturer of his own car, but against the manufacturer of another vehicle which, allegedly owing to a defect, had hit the rear of plaintiff's car.⁶ That no privity exists in that situation is quite clear. That the facts in *Cartwright* differ diametrically from the facts in *Doughty* is equally clear. The alleged lack of privity between heirs of the purchaser and the manufacturer thus finds support neither in the Civil Code nor in the jurisprudence.

Aside from the problem of privity, a certain assumption about the nature of the proper action in instances of products liability seems to pervade the *Doughty* decision. Quoting from *Cartwright*, the court in *Doughty* said:

While there are numerous appellate court decisions providing "A manufacturer or seller of a product which involves a risk or injury to the user is liable to any person, *whether the purchaser or a third person*, who without fault on his part sustains an injury caused by a defect in the design or manufacture of the article, if the injury might have been reasonably anticipated," *the fact remains that such action is one in tort and not in contract.*⁷

That contention has been the subject of intense controversy and revision in recent times in connection with the decision rendered by the Louisiana Supreme Court in *Media Productions Consultants, Inc. v. Mercedes-Benz of North America, Inc.*⁸ It is settled that an injured party who is not a purchaser may act in tort against the manufacturer of a defective product.⁹ Whether that is true in the case of an

6. *Id.* at 599, 232 So. 2d at 286.

7. *Id.* (emphasis added).

8. 262 La. 80, 262 So. 2d 377 (1972). See Note, 33 LA. L. REV. 724 (1973); Note, 47 TUL. L. REV. 473 (1973). See also Babst, *Redhibition and Tort: Are They Enough?*, 22 LA. B. J. 19 (1974); Campbell, *The Remedy of Redhibition: A Cause Gone Wrong*, 22 LA. B. J. 27 (1974).

9. For a general discussion, see Mazeaud, *La responsabilité civile du vendeur-fabricant*, 53 REVUE TRIMESTRIELLE DE DROIT CIVIL 611, 620 (1955). See *Simon v. Ford Motor Co.*, 282 So. 2d 126 (La. 1973); *Le Blanc v. Louisiana Coca-Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952); *Landry v. Adam*, 282 So. 2d 590 (La. App. 4th Cir. 1973); *Wisdom v. Ford Motor Co.*, 256 So. 2d 298 (La. App. 1st Cir. 1971); *Miller v. Louisiana Coca-Cola Bottling Co.*, 70 So. 2d 409 (La. App. Orl. 1954). See also *Tuminello v. Mawby*, 220 La. 733, 57 So. 2d 666 (1952); *George v. Shreveport Cotton & Oil Co.*, 114 La. 498, 38 So. 432 (1905); *Meche v. Farmers Drier & Storage Co.*, 193 So. 2d 807 (La. App. 3rd Cir. 1967).

injured purchaser of a defective product is at least questionable after *Media*.¹⁰ The grounds of that decision and the many reasons that make redhibition a practical and effective weapon in the battle for consumer protection have been explored elsewhere.¹¹ Generally, however, the usefulness of redhibition has been praised from the perspective of patrimonial damage suffered by a consumer. *Doughty* raises the relatively novel question whether redhibition, unquestionably contractual in nature, is equally effective to provide a remedy for physical injury suffered by a consumer, a question pretermitted in the concurring opinion.¹²

According to Louisiana Civil Code article 2545, a seller who knows of the vice of the thing he sells and omits to declare it is answerable to the buyer not only for restitution of the price and expenses but also in damages. The language of article 2545 is broad enough as to comprise damages for bodily injury. In addition, a manufacturer falls under a presumption of knowledge of defects in things of his making in accordance with the principle *spondet peritiam artis*.¹³

In French doctrine, the weight of authority favors the view that under article 1645 of the Code Napoleon, equivalent to Louisiana Civil Code article 2545, a manufacturer is liable for physical injury suffered by a purchaser of his product owing to its defects.¹⁴ To enforce the liability, a purchaser disappointed by a defective thing or injured as a result of his

10. See Note, 33 LA. L. REV. 724 (1973); Note, 47 TUL. L. REV. 473 (1973).

11. See *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Sales*, 35 LA. L. REV. 259, 310 (1975). See also Barham, *Redhibition: A Comparative Comment*, 49 TUL. L. REV. 376 (1975).

12. See *Doughty v. General Motors Corp.*, 303 So. 2d 202 (La. App. 4th Cir. 1974).

13. See *Radalec Inc. v. Automatic Firing Corp.*, 228 La. 116, 81 So. 2d 830 (1955); 3 ŒUVRES DE POTHIER, CONTENANT LES TRAITES DU DROIT FRANÇAIS 88 (Bugnet ed. 1861); Morrow, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 529, 539 (1940).

14. MAZEAUD, MAZEAUD ET TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LAW RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE 232-33 (5th ed. 1957); Cornu, *Contrats spéciaux—Vente*, 61 REVUE TRIMESTRIELLE DE DROIT CIVIL 564 (1963); Demogue, *De l'obligation du vendeur à raison des inconvénients de la chose*, 22 REVUE TRIMESTRIELLE DE DROIT CIVIL 645, 648 (1923); Malinvaud, *La responsabilité civile du vendeur à raison des vices de la chose*, 42 LA SEMAINE JURIDIQUE § 32 at 2153 (1968); Mazeaud, *La responsabilité civile du vendeur-fabricant*, 53 REVUE TRIMESTRIELLE DE DROIT CIVIL 611, 616-17 (1955); Savatier, note to *Entreprise de canalisations et de travaux publics v. consorts Ravaille*, La semaine juridique 13159 (1963).

use of it may sue the vendor's vendor or any other party in the chain of transferors of the thing ending with the original manufacturer.¹⁵ Furthermore, contemporary French writers speak of the warranty against redhibitory vices as a true warranty of safety owed by the vendor.¹⁶ On numerous occasions, French courts have found vendor-manufacturers liable for bodily injury caused by things of their making.¹⁷

The same interpretation of Louisiana Civil Code article 2545 would equip an injured vendee with a proper contractual remedy, an advantage to which he is entitled by virtue of the contract.¹⁸ The victim of an unfulfilled contractual obligation should not be cast in the same position as the victim of a quasi-delict, upon whose shoulders rests the burden of proof.¹⁹ In a situation like the one here discussed, an injured vendee

15. See *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Sales*, 35 LA. L. REV. 259, 313. See also 9 TOULLIER, LE DROIT CIVIL FRANÇAIS 121 (Duvergier ed. 1838): "Successive contracts of sale, in transferring ownership of the thing also transfer, from hand to hand and as accessories, all actions in warranty arising from each sale which are finally reunited in the hands of the last purchaser." This is so because the vendor transfers the thing *cum omnis causa*, that is, with whatever pertains to it. See 17 BAUDRY-LACANTINERIE ET SAIGNAT, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL—DE LA VENTE ET DE L'ÉCHANGE 369 (2d ed. 1900).

16. See Mazeaud, *La responsabilité civile du vendeur-fabricant*, 53 REVUE TRIMESTRIELLE DE DROIT CIVIL 611, 612 (1955): "To the obligation concerning vices, extensively regulated in articles 1641-49 of the civil code, of Roman inspiration through the channels of Domat and Pothier, the recent jurisprudence has added another obligation: the obligation of safety (*l'obligation de sécurité*). For the benefit of the vendee, a contract of sale places the vendor under an obligation of safety; in case of damage caused to the vendee by the thing sold, the vendor may thus have engaged his contractual responsibility" (translation by author). See also Malinvaud, *La responsabilité civile du vendeur à raison des vices de la chose*, 42 LA SEMAINE JURIDIQUE § 32 at 2153 (1968).

17. See CASS. June 4, 1954, D.1954.708, and decisions cited in Mazeaud, *La responsabilité civile du vendeur-fabricant*, 53 REVUE TRIMESTRIELLE DE DROIT CIVIL 611, 618 (1955). In an interesting case involving a fatal automobile accident the court dismissed an action brought against an intermediate vendor in good faith, but authoritative comment on the case asserts that the ultimate liability of the manufacturer, whom plaintiff did not join in the suit, is left unimpaired by the decision. See note by Savatier to *Entreprises de canalisations et de travaux publics v. Consorts Ravaille* in *La semaine juridique* 13159 (1963).

18. For a discussion of this aspect as well as the difficulties involved in the problem of *cumul* or accumulation of actions in contract and tort, see MAZEAUD, MAZEAUD ET TUNC, *supra*, note 14 at 225-33.

19. See 2 S. LITVINOFF, OBLIGATIONS § 182 in 7 LOUISIANA CIVIL LAW TREATISE 341 (1969).

is entitled to the minimum advantage represented by having the short prescriptive term run from the moment the vice is discovered, in accordance with article 2546 of the Louisiana Civil Code. The last problem in the *Doughty* decision involves the date of discovery of the redhibitory vice as the starting point of the prescriptive period of article 2546. According to plaintiffs, the vice was discovered upon reception of a letter from General Motors advising of a possible safety hazard in cars of that make and year. For the court, instead, the date of discovery is the date of the accident.²⁰ For its conclusion the court invoked *Landry v. Adam*,²¹ which lends no support to such a contention. *Landry* holds that a recall letter from an automobile manufacturer is not admissible to prove that a particular automobile contained a certain defect at the time of the accident, and that such a fact must be proved by direct evidence.²² The evidentiary weight of a letter of recall in regard to the existence of a particular defect in a particular car is one thing and the ability of the letter to create an awareness of the possible existence of a defect is another thing altogether. "Discovery," in the intendment of article 2546 of the Louisiana Civil Code, is the latter and not the former.

CONTRACT FOR MEDICAL SERVICES

*Steel v. Aetna Life & Casualty Co.*²³ again raised the dramatic controversy between contractual and delictual liability. After finding that plaintiffs' action for medical malpractice had prescribed in one year under the provisions of Louisiana Civil Code article 3536, applicable to offenses and quasi-offenses, the Third Circuit Court of Appeal said that a medical malpractice claim cannot be brought on a contract theory unless the physician has warranted or promised a particular result.²⁴

Such no doubt is the common law approach.²⁵ As is

20. *Doughty v. General Motors Corp.*, 303 So. 2d 202, 204 (La. App. 4th Cir. 1974).

21. 282 So. 2d 590 (La. App. 4th Cir. 1973).

22. *Id.* at 596.

23. 304 So. 2d 861 (La. App. 3d Cir. 1974).

24. *Id.* at 864.

25. See 70 C.J.S., *Physicians and Surgeons* § 57, 981-82; 41 AM. JUR., *Physicians and Surgeons*, § 104, 219 [cited by the Louisiana Supreme Court in *Phelps v. Donaldson*, 243 La. 118, 150 So. 2d 35 (1963)]. See also Note, 34 TUL. L. REV. 414 (1960).

known, in that system negligence is a specific tort and not merely a blemish on an obligor's performance of his duties, either contractual or legal, as in the civil law.²⁶ In the Anglo-Saxon legal perspective, a negligent act is analyzed as "tortious" and exclusively governed by the rules of extracontractual liability. From a civilian standpoint, a negligent act of an obligor may engage his contractual liability even when the contract contains no stipulation for a specific result.²⁷

It is quite clear that underlying the controversy between contractual and delictual liability is the question of the burden of proof.²⁸ Traditionally, in delictual actions plaintiff bears the burden of proof while the burden shifts to the defendant when an action is brought in contract. The result of such a view is that in many instances courts are probably loath to allow a claim in contract under the impression that plaintiff's burden would be greatly, and perhaps unfairly, alleviated if that were done.²⁹ When medical malpractice is concerned, public policy implications may warrant such an attitude.³⁰

For a long time the same approach prevailed in civilian jurisdictions.³¹ In this century, however, a significant departure started in France through the discovery of a new criterion for the classification of obligations. As first expounded by an eminent scholar in 1925, besides the classical to give and to do or not to do, obligations may be classified, from the viewpoint of the performance owed by an obligor, into those of result (*obligation de résultat*), that is, obligations to provide a

26. See CRÉPEAU, *CIVIL RESPONSIBILITY: A CONTRIBUTION TOWARDS A REDISCOVERY OF CONTRACTUAL LIABILITY*, ESSAYS ON THE CIVIL LAW OF OBLIGATIONS, 83, 85 (Dainow ed. 1969) [hereinafter cited as CRÉPEAU]. See generally L. MILLNER, *NEGLIGENCE IN MODERN LAW* (1972). See also CRÉPEAU at 85.

27. See 6 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 184-88 (1931) [hereinafter cited as 6 DEMOGUE]; 1 MAZEAUD, *MAZEAUD ET TUNC*, *supra*, note 14 at 190-223.

28. For a general discussion of important differences between the two regimes of liability, see Percy, *Products Liability—Tort or Contract or What?*, 40 TUL. L. REV. 715, 726 (1966); Note, 47 TUL. L. REV. 473, 479 (1973). In the text above, however, the discussion will be focused on the burden of proof.

29. CRÉPEAU at 98.

30. Mettarlin, *Contractual and Delictual Responsibility in Quebec: The Rediscovery of Contract*, 8 MCGILL L. J. 38, 49-50 (1961). See also Crépeau, *La responsabilité médicale et hospitalière dans la jurisprudence québécoise récente*, 20 REVUE DU BARREAU 433, 438 (1960).

31. CRÉPEAU at 99; 6 DEMOGUE at 184 (1931).

certain and definite or specified result, and those of means (*obligation de moyen*), that is, obligations to provide or employ certain means, without implying any promise of achieving a specific result.³² Thus, the obligation of a carrier of goods under article 2754 of the Louisiana Civil Code, that of a builder according to a plot under article 2769, and that of a seller under articles 2475 and 2476 are examples of obligations of result according to the description of the pertinent duties in those articles. Under article 2746, however, the obligation of a lessor of labor or industry is one of means, that is, an obligation to use certain skills for a particular purpose. A bank, for instance, in accepting deposits from the public, assumes an obligation of result, namely, that the money will be made readily available to the depositor on demand. In letting out a safe-deposit box, the same bank assumes only an obligation of means, namely, to provide security measures for the custody of the box.³³ It follows naturally that the contractual obligation of a physician is one of means, that is, to provide the skills of his profession and the benefit of his scientific knowledge towards the patient's cure, but without warranting a result.³⁴ If that were not so, as Demogue reflected, physicians would have to prove a fortuitous event or an irresistible force in order to elude liability any time their patients die in spite of their efforts, which does not seem to be the case.³⁵

The new approach to classification, introduced into Louisiana legal doctrine not long ago, calls for a re-examination of traditional conclusions about the burden of proof when a breach of defendant's obligation is alleged.³⁶ In re-examination, contractual or delictual liability is no longer the

32. 5 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 538-545 (1925) [hereinafter cited as 5 DEMOGUE]. See also COMPARATO, *ESSAI D'ANALYSE DUALISTE DE L'OBLIGATION EN DROIT PRIVÉ* 37 (1964); 1 MAZEAUD, MAZEAUD ET TUNC, *supra*, note 14 at 115-22; TUNC, *LA DISTINCTION DES OBLIGATIONS DE RÉSULTAT ET DES OBLIGATIONS DE DILIGENCE*, *JURIS-CLASSEUR PÉRIODIQUE I* 449 n.54 (1945).

33. See 5 DEMOGUE 539. Demogue's novel classification was carried further in the work of other writers who speak in terms of a tripartite classification, namely, obligation of result, obligation of diligence and prudence (means) and obligation of warranty (*obligation de garantie*). See MAZEAUD, MAZEAUD ET TUNC, *supra*, note 14 at 113-17.

34. 5 DEMOGUE at 540; 6 DEMOGUE at 134-38. See also CRÉPEAU at 98-99.

35. 5 DEMOGUE at 540.

36. Obligations of results and obligations of means are discussed in 1 S. LITVINOFF, *OBLIGATIONS* § 27 in 6 LOUISIANA CIVIL LAW TREATISE 47, 48 (1969) [hereinafter cited as 1 LITVINOFF].

sole criterion to determine the *onus probandi*. Defendant may have breached a contractual obligation, and the burden of proof may still rest on the plaintiff's shoulders. It all depends on whether the breached contractual obligation was one of results or one of means or diligence.³⁷ It can now be readily understood that if the obligor's contractual duty was merely one of means or diligence, to establish a failure in the performance of such duty the obligee will have to prove that the obligor did not take the care reasonably expected of him under the circumstances, that he did not act as a *bonus pater familias*—or prudent administrator in Louisiana legal parlance.³⁸ In other words, the obligee must prove negligence, a fairly severe burden no doubt.³⁹ If instead the obligation is of result, the obligee's burden is less onerous, as the obligor's failure to produce the stipulated result gives rise to a presumption of fault on his part, a presumption of which he can rid himself only by proving a fortuitous event or irresistible force.⁴⁰

By adopting the modern distinction between contractual obligations of results and those of means or diligence, a fallacy latent in the traditional dichotomy of delictual and contractual liability was finally dispelled. As not all contractual duties are obligations of result, the traditional distinction lost significance regarding the burden of proof. Thus, in the example of a bank, if the depositor's money is not returned on demand, that is as much as he must prove to engage the bank's liability for the breach of its obligation of result.⁴¹ If securities or other valuables placed in a safe-deposit box are missing, however, the client-lessee must prove that because of the bank's dereliction of its duty of diligence, namely the obligation to provide adequate security measures, the contents of the box were stolen.⁴²

Recognizing the accuracy and importance of the new classification, French courts changed their approach to cases

37. 5 DEMOGUE 538-45. See also CRÉPEAU at 98; Metlarlin, *supra*, note 30 at 44.

38. See LA. CIV. CODE art. 1908; CRÉPEAU at 97.

39. 5 DEMOGUE at 543, MARTINE, L'OPTION ENTRE LA RESPONSABILITÉ CONTRACTUELLE ET LA RESPONSABILITÉ DÉLICTELLE 16, 26 (1957); MAZEAUD, MAZEAUD ET TUNC, *supra*, note 14 at 772-73.

40. CRÉPEAU at 97.

41. 5 DEMOGUE 539.

42. *Id.*

involving a physician's liability in 1936.⁴³ In that year, the *Cour de cassation* decided that a physician may be held liable *ex contractu*, and that the patient may yet be held to prove that the doctor has not exercised due care in the performance of his professional duties. Since then, French courts have asserted that the obligations of a physician vis-à-vis his patient are contractual obligations of means or diligence generally, and that the liability engaged for the breach of such obligations is therefore contractual in nature.⁴⁴ The courts in Quebec have followed the same approach since 1957.⁴⁵

The result of the French approach is that, though the burden of proof as to the physician's lack of care is on the plaintiff, as in cases in which the liability involved is delictual, all other technical aspects of the contractual regime, such as the very important one of prescription, are applicable.⁴⁶ Noticeably, the handling of the problem with civil code tools leads to that solution in a natural way. A glance at article 1903 of the Louisiana Civil Code suffices to show that a physician is bound by an obligation of diligence as a matter of course.⁴⁷ While this conclusion is not totally ignored at common law, when it has obtained, it has been done by straining familiar concepts, as by asserting that the action is one in tort, though inexplicably—or miraculously?—subject to a contractual prescriptive term or by dramatic discovery of an implied-in-fact contractual relation between doctor and patient at common law.⁴⁸

43. See Civ. May 20, 1936, D.1936.1.88, rapp. Jossierand, S.1937.1.321, note by Breton.

44. See Civ. June 27, 1939, D.C.1941.53, note by Nast, S.1940.1.73, note by Morel; Civ. July 13, 1949, D.1949.423; Grenoble, Nov. 4, 1946, D.1947.I.79; Paris Oct. 18, 1949, D.1949.538; Pau, March 12, 1953, D.1953 somm. 75; Aix, Nov. 10, 1953, D.1954.11.

45. See *X. v. Mellen*, B.R. 389 (1957); *G. v. C.* B.R. 161 (1960); *Beausoleil v. La Communauté des Soeurs de la charité*, B.R. 37 (1965); *Hotel Dieu St. Vallier v. Martel*, B.R. 389 (1968); citations in CRÉPEAU at 99; Mettarlin, *supra*, note 30 at 43-44.

46. MAZEAUD, MAZEAUD ET TUNC, *supra*, note 14 at 183-89. See also CRÉPEAU at 98-99; MARTINE *supra*, note 39 at 22-26.

47. That article reads: "The obligation of contracts extends not only to what is expressly stipulated, but also to everything that, by law, equity or custom, is considered as incidental to the particular contract, or necessary to carry it into effect." For a general discussion of the determination of the obligational content of a contract see Crépeau, *Le contenu obligationnel d'un contrat*, 43 CAN. BAR REV. 3 (1965).

48. For cases applying a contractual prescriptive term, see *Vanhooser v.*

If the *obligation de moyen* approach were adopted by Louisiana courts it would become unmistakably clear that Louisiana Civil Code article 3544, not article 3536, governs prescription in situations like the one in *Steel v. Aetna Life & Casualty*.⁴⁹

It must be recognized that in rendering the *Steel* decision the court expressed clear misgivings and finally chose to avoid conflict with the ruling of the Louisiana Supreme Court in *Phelps v. Donaldson*,⁵⁰ rather than draw subtle distinctions as another court did in *Creighton v. Karlin*⁵¹ and *Barrios v. Sara Mayo Hospital*.⁵² The holding in *Phelps*, however, is fifteen years old. It is not unprecedented for a Louisiana appellate court to depart from directions by the state's highest court, especially when the passage of time allows a new perspective on certain legal conflicts.⁵³

ACCORD AND SATISFACTION

The always interesting problem of the relation between the law of Louisiana and "accord and satisfaction" has been brought into focus again in *Charles X. Miller, Inc. v. Oak Builders, Inc.*⁵⁴ The Fourth Circuit Court of Appeal holds in that case that, against the background of a dispute between the parties, the negotiation of a check received "in full payment" operates as an accord and satisfaction, even if the endorsement has been changed from payment in full to part payment.⁵⁵ To arrive at that conclusion the court said that estoppel by accord and satisfaction is a common law concept judicially incorporated into the Louisiana jurisprudence by the Louisiana Supreme Court, and grounded on basic contractual principles of offer and acceptance.⁵⁶

Berghoff, 90 Mo. 487 (1886); Conklin v. Draper, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dept. 1930); Kernodle v. Elder, 23 Okla. 743, 102 Pac. 138 (1909). For the discovery of an implied-in-fact contract at common law, see Peterson v. Phelps, 123 Minn. 319, 143 N.W. 793 (1913); Parkell v. Fitzporter, 301 Mo. 217, 256 S.W. 239 (1923); Note, 43 TUL. L. REV. 414 (1960).

49. 303 So. 2d 861 (La. App. 1st Cir. 1960).

50. 243 La. 1118, 150 So. 2d 35 (1963).

51. 225 So. 2d 288 (La. App. 4th Cir. 1969).

52. 264 So. 2d 792 (La. App. 4th Cir. 1972).

53. See Coulon v. Anthony Hamlin, Inc., 93 So. 2d 557 (La. App. Orl. Cir. 1957); Collet v. Otis, 80 So. 2d 117 (La. App. 1st Cir. 1955). See also Tate, *Techniques of Judicial Interpretation*, 22 LA. L. REV. 727 (1962).

54. 306 So. 2d 449 (La. App. 4th Cir. 1975).

55. *Id.* at 452.

56. *Id.* at 451.

The true nature of accord and satisfaction, and whether it harmonizes with the civil law of Louisiana, cannot be determined without an inquiry into the civil law "transaction" and the common law "compromise" and "accord."⁵⁷ Under Louisiana Civil Code article 3071, a transaction or compromise is an agreement by which the parties make reciprocal concessions in order to prevent litigation or to put an end to it.⁵⁸ Unlike article 2044 of the Code Napoleon, the Louisiana precept contains an indication of the means to be used to achieve the purpose, namely, an adjustment of differences by mutual consent.⁵⁹ As clearly formulated by the Louisiana jurisprudence, that adjustment of differences, preferred by each party to the hope of gaining balanced by the danger of losing, constitutes the only cause needed for the validity of the contract.⁶⁰

At common law, an agreement settling a dispute, either in or out of court, in view of the uncertainty between the parties regarding the facts, or the facts and the law together, is a compromise.⁶¹ If a claim is subject to dispute in good faith, payment or other performance by the debtor is held to be a sufficient consideration for a return promise.⁶² At first blush, that seems to conflict with the common law rule that performance of a pre-existing duty is not a sufficient consideration. The conflict is tentatively resolved by casting some doubt on the duty that allegedly pre-exists and saying that the debtor need not consider himself bound to pay until a court orders him to do so; hence, if he offers some performance without such an order, that furnishes the consideration.⁶³ On the other hand,

57. For a full discussion, see 1 LITVINOFF § 372-99 at 636-76.

58. *Id.* § 388 at 654-55.

59. *Id.* § 372 at 636-37.

60. See *Gregory v. Central Coal & Coke Corp.*, 179 La. 95, 200 So. 832 (1941).

61. *O'Hare v. Peterson*, 150 Neb. 151, 33 N.W.2d 566 (1948); *Cole v. Harvey*, 200 Okla. 564, 198 P.2d 199 (1948); *Matthews v. Matthews*, 49 Me. 586 (1863); *Cannavina v. Poston*, 13 Wash. 2d 182, 124 P.2d 787 (1942). For a general discussion, see 1 LITVINOFF § 331 at 641.

62. W. ANSON, *CONTRACTS* 92 (2d ed. Guest 1959) [hereinafter cited as ANSON]; A. CORBIN, *CONTRACTS* § 187 at 270 (1952) [hereinafter cited as CORBIN]; G. GRISMORE, *CONTRACTS* 107 (Murray ed. 1965) [hereinafter cited as GRISMORE]; S. WILLISTON, *CONTRACTS* § 128 (1938) [hereinafter cited as WILLISTON].

63. 1 LITVINOFF § 381 at 641 (1969). It is frequently stated that the law favors compromise. *E.g.*, *W.J. Perryman & Co. v. Penn Mut. Fire Ins. Co.*, 324 F.2d 791 (5th Cir. 1963); *Rome v. Archer*, 41 Del. 404, 197 A.2d 49 (1964).

[r]eduction of litigation by mutual agreement of litigants is much to the public interest; and in order to attain this desired end, it is necessary to sustain the compromise agreement without regard to whether the claim was correct or incorrect.⁶⁴

So far, the equivalence between a civilian transaction and a common law compromise is inescapable, which amply justifies the dual designation adopted in Book 3, Title XVII, article 3071 of the Louisiana Civil Code.

Closely related to compromise, the common law provides other interesting categories. Thus, an "accord executory" is an agreement for the future discharge of an existing claim by a substituted performance.⁶⁵ It is the promised performance that is to discharge the existing claim, and not the promise to render the performance.⁶⁶ It makes no difference whether the claim is liquidated or not, disputed or undisputed, although these facts will bear upon the sufficiency of the consideration for the promises in the new agreement.⁶⁷

As a matter of fact, most compromise agreements are executory accords; but a compromise may also be a substituted contract immediately discharging the original claim.⁶⁸ Many compromise agreements are not substituted contracts, however, because it is the "performance" that will operate as a *future* discharge, the "promise" not being accepted in *present* discharge.⁶⁹ Truly enough, an accord executory may be made as an agreement for the future discharge of an undisputed claim, in which case it would not seem to be a compromise. In the words of Corbin, however, "Most executory accords are agreements for the future discharge of unliquidated claims; and in many cases the amount actually due is in dispute."⁷⁰ A compromise, in sum, when not made as a substituted contract, is an executory accord.⁷¹

64. CORBIN § 187 at 165.

65. *See generally id.* § 1268.

66. *Id.* *See also* 1 LITVINOFF § 382 at 644.

67. *Id.*

68. CORBIN §§ 1062-67. The common-law "substituted contracts" are discussed at civil law under the heading of "novation"; *see* LA. CIV. CODE art. 2185. For a discussion of "novation" at common law, *see* 1 LITVINOFF § 382 at 644 n.94.

69. *Owens v. Hunter*, 91 Ariz. 7, 368 P.2d 753 (1962).

70. CORBIN § 1027.

71. *See* GRISMORE § 212 at 339-40; 1 LITVINOFF § 382 at 644.

When it is said that an obligation has been discharged by accord and satisfaction, what is meant is that the discharge has taken place by the rendering of some performance different from the one the creditor claimed as due, and that his acceptance of the substituted performance is full satisfaction of the original claim.⁷² The parties may have previously entered into an accord executory for the future discharge of the existing claim. If so, after the executory contract is fully performed in the agreed manner, there is an accord and satisfaction, and the original claim is discharged.⁷³ The parties, however, may make an accord and satisfaction without a prior accord executory of any kind, as when the debtor offers a substituted performance in satisfaction of his debt, and the creditor receives it, without the parties having made any binding promises, or when the creditor requests a certain performance in satisfaction of his claim and the debtor renders it, again without any prior executory promises.⁷⁴ At the moment of acceptance, this contract has been wholly executed and nothing more need be done by either party, as the original debt has been discharged.⁷⁵ In this perspective, an accord and satisfaction is an executed accord.⁷⁶

Analyzing common law compromise and accord and satisfaction in context, the following conclusions may be drawn. When a claim is disputed or unliquidated, an agreement for a future discharge by a substituted performance is a compromise, not distinguishable from an accord executory. As an accord can also be made on an undisputed claim, however, it follows that "a compromise is always an accord, but that an accord is not necessarily a compromise."⁷⁷ When the future performance takes place it operates as satisfaction and the

72. ANSON at 396; CORBIN § 1276; E. HARRIMAN, *CONTRACTS* 314 (1901); WILLISTON § 1838. *See also* Brock & Blevins Co. v. United States, 343 F.2d 951 (1965); Porter v. Berwyn Fuel & Feed Co., 244 Md. 629, 224 A.2d 622 (1965); Long v. Weiler, 395 S.W.2d 234 (Mo. 1965).

73. 1 LITVINOFF § 383 at 647.

74. Fairchild v. Mathews, 91 Idaho 1, 415 P.2d 43 (1966); Hoadley v. Hoadley, 114 Vt. 75, 39 A.2d 769 (1944); ANSON at 396; CORBIN § 1276; WILLISTON § 1851.

75. *Id.* *See also* 1 LITVINOFF § 383 at 648.

76. *See* CORBIN §§ 1276-77; WILLISTON § 1852. *See also* 1 LITVINOFF § 383 at 648.

77. Eastern Steel Prod. Corp. v. Chesnut, 252 N.C. 269, 271, 113 S.E.2d 587, 589 (1960): "Compromise as distinguished from accord and satisfaction, must be based on a disputed claim, while accord and satisfaction may be based on an undisputed or liquidated claim." *Id.* *See* CORBIN § 1281.

obligation is discharged. If then there is a dispute over a claim, an accord and satisfaction is an executed compromise.⁷⁸ If the parties have previously entered into an accord executory in the form of a compromise, it is clear that, after having been performed, the compromise becomes an accord and satisfaction.⁷⁹ If no previous compromise was made, if no executory promises were exchanged but the debtor offered a sum in full settlement and the creditor accepted right away thereby effecting a discharge, it is also clear that the parties have settled their dispute by means of an accord and satisfaction instead of a compromise.⁸⁰

Thus, though different in nature, both may put an end to a dispute: a compromise because of its very nature, since it is an agreement specially designed to serve such a purpose; an accord and satisfaction, because it may serve the same purpose when the parties have entered into it in order to settle a dispute.⁸¹ At any rate, since a valid accord and satisfaction may occur for purposes other than settling a dispute, its scope of application is broader than the scope of a compromise. It can be said that an executed compromise is always an accord and satisfaction, but that not every accord and satisfaction is an executed compromise.⁸²

As does any other common law contract, an accord, executory or executed, requires consent and consideration for its validity. Regarding that which is performed by the debtor, a performance is nonetheless a substituted one even though it consists in payment of a sum of money different from the one claimed by the creditor.⁸³ All such matters, together with the special problems involved in payment by check and in payment of what is habitually called the "lesser undisputed amount," have been fully discussed elsewhere.⁸⁴

It now remains to be seen whether the same connection between a compromise and an accord and satisfaction that exists at common law also exists between a civilian *transaction* and an accord and satisfaction, or, in other words, whether an accord and satisfaction may also be termed an

78. 1 LITVINOFF § 387 at 653.

79. CORBIN § 1293.

80. 1 LITVINOFF § 387 at 654.

81. See generally CORBIN § 1278; 1 LITVINOFF § 387 at 654.

82. *Id.* Eastern Steel Prod. Corp. v. Chesnut, 252 N.C. 269, 113 S.E.2d 587 (1960).

83. CORBIN § 1289; 1 LITVINOFF § 386 at 651-52.

84. 1 LITVINOFF §§ 384-87 at 648-54.

executed *transaction*. That question becomes especially relevant in situations where, as in the *Steel* case, the debtor sends a sum equivalent to the lesser of two possible amounts in full payment.

For that purpose, it is worthwhile to remember that a reasonable apprehension that a suit may be filed, or the slightest doubt as to the outcome of a suit already filed, suffices as the cause of a *transaction*, even when the parties do not have sufficient reason to believe that the claim or the right of one of them may be contested or pursued with any hope of success.⁸⁵ In the words of the redactors of the French Civil Code, "The problem of ascertaining whether, under given circumstances, the party who entered into a *transaction* could have reasonably been apprehensive of the starting of litigation, or have sheltered any doubts as to the outcome of one already started, is, as a matter of course, left to the appreciation of the courts."⁸⁶

In addition, obtaining immediate payment of a debt or payment within an agreed delay, as an advantage over the institution of procedures for the execution of a judgment, is a valid cause for a *transaction*, as the interest of the creditor may be satisfied in a better way by taking this sort of shortcut rather than facing the difficulties a judicial execution may present.⁸⁷

Assuming now a controversy between the parties as to the amount of a debt, the fact that the difference of opinion consists in whether a lesser or a larger sum is owed does not make the lesser amount a liquidated one. It has been thus asserted that a dispute over the amount prevents a debt from having the character of a liquidated debt, which is a requirement for the operation of legal compensation or set off.⁸⁸ If that is the case, the creditor who insists on his right to collect the greater amount would have no other choice than filing

85. 6 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS 191 (5th ed. 1920).

86. 18 DURANTON, COURS DE DROIT FRANÇAIS SUIVANT LE CODE CIVIL 395-98 (1834); Bigot-Preameneu, Exposé des motifs, 15 Loche, Leg. 416, No. 2 (translation in text by author).

87. REQ. Nov. 12, 1902, D.1902.1.566, S.1905.1.14; 6 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS 192 (5th ed. 1920); 11 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 922 (1932).

88. See FRENCH CIV. CODE art. 1289; LA. CIV. CODE art. 2207; 7 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 690 (2d ed. Esmein 1954). See also CASS. COM. Oct. 18, 1961, Bull. civ. III, n.366, at 316; Trib. civ. Lille, April 4, 1958, Gaz. Pal. 1958.2.49; Civ. April 15, 1942, D.C.1943.106.

suit. On the other hand, to pay his debt is not only the debtor's duty, it is also his right. Indeed, when the creditor refuses to collect, the debtor has the right to make a real tender, and on the creditor's refusal to accept it, to deposit the sum tendered with the court. Though the tender and deposit must be of the whole of the sum demandable, it has been repeatedly asserted in French jurisprudence that the question of determining whether the sum tendered was sufficient to discharge the debt is for the court to decide.⁸⁹

It is not true then that in such a situation the lesser amount is "undisputed." When a debt is unliquidated, and the parties disagree over which of two different amounts is due, both amounts are "disputed." It is not as though the parties agree that the debtor owes "at least" the lesser amount, because the debtor's contention is that he owes "only" the lesser amount. His right to be exonerated upon payment sufficiently explains why he cannot be forced to deliver as part payment the sum that he, in good faith, may consider to be the full payment of his obligation.⁹⁰

In that situation the creditor might very well regard with apprehension the necessity of having to sue or the chance of being sued by the debtor. The prevention of either alternative is a valid cause for a transaction or compromise. With such a dispute in the background, then, reception by the creditor of the lesser amount, in money or check, in full payment, together with his keeping the money or cashing or endorsing the check, seems to have all the necessary elements of an implied consent given to the *transaction* offered by the debtor.⁹¹

The objection still could be raised that in such a case there are no reciprocal concessions from the parties, as the debtor who pays the sum he thinks he owes is apparently making no concession to his creditor. The objection can be easily overcome through the realization that in a contract of *transaction* or compromise the cause is twofold.⁹² One is the special cause, the end shared in the contemplation of both parties, which is to avoid litigation. The other is the ordinary

89. See FRENCH CIV. CODE art. 1258(3) and LA. CIV. CODE art. 2168(3). See also CIV. May 12, 1952, D.1952. 793; May 24, 1927, D.H.1927.349.

90. 1 LITVINOFF § 399 at 675.

91. See LA. CIV. CODE arts. 1811, 1816, 1818.

92. See 1 LITVINOFF § 228 at 409-11 & § 378 at 639-40. See also CAPITANT, DE LA CAUSE DES OBLIGATIONS 13 nn.1, 31, 41, & 43 (1923).

cause or that which the parties concede themselves reciprocally, each one in view of the other's concession.⁹³ Because it is supported by strong public policy reasons, the special cause overshadows the ordinary one which may thus be found even in minimal aspects of the agreement. The fact that the debtor, although paying what he thinks he owes, notwithstanding gives up the satisfaction of having the court declare that he was right, or the fact that the debtor might have gone to great difficulty to secure the money paid suffices to fulfill the requirement of an ordinary cause in a *transaction*. In other words, just as the slightest doubt of which litigation may derive suffices to provide a *transaction* with a special cause, in like manner the slightest inducement furnished by the other party suffices as a valid ordinary cause for the same contract.⁹⁴

The last point left for clarification involves the fulfillment of a formal requirement. Louisiana courts have repeatedly asserted that a writing is required to give validity to a *transaction*, a correct conclusion under Louisiana Civil Code article 3071.⁹⁵ That a check is such a writing, as Louisiana courts have held on several occasions, is also a correct conclusion under article 2243.⁹⁶ When a certain amount is paid in full by check, the formal requirement is met.

Louisiana courts have not always said, as in *Charles X. Miller, Inc. v. Oak Builders, Inc.*, that accord and satisfaction is a notion imported from the common law. At times the jurisprudence has drawn a distinction between "transaction or compromise" and "accord and satisfaction."⁹⁷ At other

93. 1 LITVINOFF § 399 at 675.

94. *Id.* 675-76.

95. See *Charbonnet v. Ochsner*, 258 La. 507, 513, 246 So. 2d 844, 846 (1971); *Witherwax v. Zurich Ins. Co.*, 315 So. 2d 420 (La. App. 3d Cir. 1975); *Bugg v. State Farm Mut. Auto. Ins. Co.*, 295 So. 2d 194, 198 (La. App. 4th Cir. 1974); *Dunham Concrete Prod., Inc. v. Donnell Const. Co.*, 268 So. 2d 104 (La. App. 1st Cir. 1972).

96. See *Thompson v. Stacy*, 148 So. 2d 834, 836 (La. App. 4th Cir. 1963): "Plaintiff contends that an agreement of compromise must be in writing Here, there was a writing, to-wit, both the check and the invoice" See also *Theatre Time Clock Co. v. Motion Picture Adv. Corp.*, 323 F. Supp. 172, 175 (E.D. La. 1971): "Here there was a writing, a check made out in full settlement" See also *C. & M. Properties, Inc. v. R.B. Alexander, Inc.*, 219 So. 2d 229 (La. App. 1st Cir. 1969).

97. See *Pipes v. Jesse F. Heard & Sons, Inc.*, 258 So. 2d 187 (La. App. 2d Cir. 1972): "Whether the transaction at issue is referred to as a compromise and settlement or an accord and satisfaction is of no importance as we

times the two expressions have been used indistinctly thereby implying that a valid *transaction* or compromise may be effected through the mechanism of an accord and satisfaction.⁹⁸ The latter is the most satisfactory approach in the context of the Louisiana law because the contract of *transaction*, at civil law, is flexible enough to produce the same results achieved through an accord and satisfaction at common law in situations involving payment of the lesser "undisputed" amount of an otherwise disputed claim.⁹⁹

understand the definition of these terms Any claim that is satisfied by some substituted performance is discharged by an 'accord and satisfaction.' If the claim discharged in this matter was a disputed claim or one in which there is some area of doubt then the transaction is also a 'compromise.' " *Id.* at 190.

98. See *Hancock v. Lincoln American Life Ins. Co.*, 278 So. 2d 561 (La. App. 1st Cir.), *cert. denied*, 281 So. 2d 754 (1973), *quoting* *Pontchartrain Park Homes v. Sewerage & Water Bd.*, 246 La. 893, 168 So. 2d 595 (1964).

99. See 1 LITVINOFF § 393 at 20-21 (Supp. 1975).